STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 17, 2009
v	No. 280835 Ingham Circuit Court
STANLEY ALBERT PRICE, Defendant-Appellant.	LC No. 06-000224-FC

Before: Murphy, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317, arising out of a killing on the campus of Michigan State University back in 1973. He was sentenced to 25 to 40 years' imprisonment. We affirm.

Defendant first argues that the trial court introduced evidence and cross-examined witnesses in a manner that unduly influenced the jury and denied defendant his right to a fair and impartial trial. Defendant complains that the court acted as a prosecutor, piercing the veil of judicial impartiality, and disrupted the trial several times, reiterating points that were unfavorable to the defense.

A trial court pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and in so doing deprives the defendant of a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). The trial court, however, is permitted to question witnesses in order to clarify testimony or elicit additional relevant information; but, it should exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. *People v Conyers*, 194 Mich App 395, 404-405; 487 NW2d 787 (1992). In *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988), this Court observed:

> Michigan case law provides that a trial judge has wide discretion and power in matters of trial conduct. This power, however, is not unlimited. If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments "were of such a nature as to unduly

> influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." [Citations omitted.]

We have thoroughly reviewed and scrutinized the alleged instances of judicial misconduct and find that they do not demonstrate that the court acted improperly or revealed a bias against defendant and in favor of the prosecutor. While the trial court frequently chose to independently question witnesses, the questioning was generally directed at clarifying points made during examination by counsel or eliciting additional pertinent evidence.[1] Indeed, it is arguable that some of the questioning was favorable to defendant, and much of the court's examination ultimately had little bearing on significant matters. Although some of the trial court's questions were unnecessary because the subject matter had already been fully explored by counsel, they were not intimidating, argumentative, prejudicial, unfair, or partial. The fact that some of the testimony elicited by the trial court may have been damaging to defendant does not mean that the court pierced the veil of judicial impartiality. Any relevant evidence will typically favor one side or the other, and a court cannot be faulted for genuinely attempting to simply draw pertinent information out of a witness.

We will now specifically address the one instance of alleged judicial misconduct that defendant asserts was the most egregious example of misconduct. Defendant maintains that the trial court improperly elicited testimony from his ex-wife regarding domestic abuse inflicted by defendant, thereby violating MRE 404(a) and (b). Defendant's ex-wife testified, on examination by defense counsel, that in 1989 she told police over the phone that defendant had threatened to kill her "like he killed that student at Michigan State." She had also conveyed other information regarding details of the murder in that phone conversation with police. However, she now denied that defendant ever made any incriminating statements, and she conceded that she lied to police in 1989. The challenged elicited testimony showing a history of physical abuse by defendant against his former wife arguably lent credence to her claim that she had lied to police and had falsely accused defendant of making incriminating statements. The evidence provided a motive to fabricate. Thus, the court's examination might be viewed as being beneficial to defendant; therefore, there would be a lack of prejudice flowing to defendant, assuming that MRE 404 was even violated. Our theory and observation is fully supported by the questioning of defendant's former wife as conducted by *defense counsel*, wherein she explained that she was going to do anything necessary, including lying, to get defendant arrested at the time of the 1989 incident, thereby preventing him from continuing to hit and harm her.

Moreover, the purpose of the testimony was not to show that defendant was a person of bad character who was thus more likely to have committed the murder, i.e., criminal propensity evidence. Rather, the evidence gave the jury relevant information regarding the dynamics of defendant's relationship with his ex-wife, thereby providing some context to her statement to police concerning defendant's incriminating remarks made in 1989.[2] Accordingly, MRE 404

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[1] We note that at times questioning by the trial court was imperative given the murkiness of some of the testimony as elicited by counsel without clarification.

[2] On earlier cross-examination by defense counsel, defendant's ex-wife testified that by the time of the 1989 incident her relationship with defendant had essentially been destroyed. The

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was not offended. See *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994) ("Relevant other acts evidence does not violate Rule 404[b] unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith"). And any notice deficiency under MRE 404(b)(2) does not warrant reversal given that the evidence was substantively admissible and that there is no indication that defendant would have reacted or proceeded differently with proper notice. See *People v Hawkins*, 245 Mich App 439, 455-456; 628 NW2d 105 (2001).

In sum, on the claim of judicial misconduct, we hold that defendant was not deprived of his right to a fair and impartial trial.

Defendant next argues that trial counsel was ineffective for failing to request a *Walker* hearing[3] in order to challenge the voluntariness of defendant's statements to police, for failing to request a *Wade* hearing[4] in order to challenge a photographic array, for allowing privileged spousal communications to be admitted without objection, for failing to challenge the ex-wife's testimony concerning domestic violence, for failing to seek exclusion of photographs of the victim's stab wounds, for failing to challenge the prosecutor's opening statement suggesting that race played a role in the killing, and for failing to ensure that inadmissible lay opinion testimony was stricken from the record. We hold that these arguments do not warrant reversal.

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law that this Court reviews, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability

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domestic abuse would explain why the relationship had deteriorated. The evidence of domestic abuse was also relevant to explaining why she had been fearful of defendant, which she earlier testified to on examination by counsel without challenge.

[3] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[4] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

> sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

With respect to the alleged need for a *Walker* hearing, defendant maintains that his statements to police during his initial interviews in 1973 should have been excluded because they were involuntary. Defendant argues that he did not acknowledge the reading of his rights, did not indicate that he understood his rights, refused to sign a written waiver of his rights, and that questions regarding his right to have an attorney present at the time should also have been explored. There was police testimony, however, that defendant was fully informed of his constitutional rights, including the right to an attorney, acknowledged his rights, indicated that he understood his rights, and was willing to speak to police on the subject of the murder and his whereabouts, even though he did not want to sign anything regarding his rights. Given this trial testimony, and considering the surrounding circumstances of the interrogations and defendant's education and intelligence level, we cannot conclude that defendant's statements to police were involuntary, nor that any other constitutional rights were infringed. *People v Daoud*, 462 Mich 621, 634; 614 NW2d 152 (2000). Counsel is not ineffective for failing to raise futile or meritless motions or objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

With respect to the alleged need for a *Wade* hearing, defendant contends that witnesses testified about a photographic lineup in which only one photo had a person wearing army fatigues, identified as defendant by the witnesses, and that the array was conducted after these witnesses had earlier informed police that they observed two black men wearing army fatigues walking briskly near the crime scene around the time of the murder. "A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). Placing only one individual in army fatigues, the suspect, in a photo array after being informed that the witness about to examine the array previously described individuals at the scene as wearing army fatigues is questionable police conduct.[5] But we cannot conclude that the fatigues alone made the array so impermissibly suggestive that it gave rise to a substantial likelihood of misidentification. Moreover, defendant has failed to overcome the strong presumption that counsel's choice not to challenge the photo array in a *Wade* hearing constituted sound trial strategy. Given some of the cross-examination, and considering all of the evidence submitted by the prosecution, it appears that counsel desired to use the questionable photo array and the emphasis on army fatigues to assail the government's case. We are not prepared to rule that this strategy was constitutionally deficient.

With respect to privileged marital communications, defendant asserts that counsel should have objected to the testimony of defendant's ex-wife regarding statements made by defendant during the marriage. In support, defendant cites MCL 600.2162(7), which provides:

[5] Contrary to the prosecutor's assertion, there was police testimony that defendant was the only individual in the photo array wearing army fatigues.

> Except as otherwise provided in subsection (3),[6] a married person or a person who has been married previously shall not be examined in a criminal prosecution as to any communication made between that person and his or her spouse or former spouse during the marriage *without the consent of the person to be examined*. [Emphasis added.]

The statute clearly indicates that only the former spouse who is being examined must consent to the giving of testimony. This Court rejected an argument similar to the one made here in *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004), wherein the panel ruled:

> The spousal privilege provides that one spouse may not be examined in a criminal prosecution of the other spouse without the *testifying* spouse's consent, except under certain specified circumstances. MCL 600.2162(2). Defendant contends that counsel was ineffective for failing to assert the privilege with respect to [his wife]. However, defendant has failed to show that [his wife] did not or would not have consented to testifying at trial. Defendant has therefore failed to show that any objection to [his wife's] testimony by defense counsel would not have been futile. Counsel is not required to raise meritless or futile objections, and thus defense counsel was not ineffective.

While *Moorer* dealt with subsection (2) of the statute, which pertains solely to spouses who are married at the time of trial, subsection (7) contains comparable language indicating that the issue of consent relates only to the former spouse who is taking the stand.[7] Here, defendant has failed to show that his ex-wife did not or would not have consented to testifying at trial. Accordingly, defendant has failed to show that any objection to the testimony of his former spouse by defense counsel would not have been futile.

We note that in 1989, when defendant made certain statements to his then wife, the statute would have required defendant's consent before testimony about the statements could be admitted. See *People v Hamacher*, 432 Mich 157, 161-162; 438 NW2d 43 (1989). However, in *People v Dolph-Hostetter*, 256 Mich App 587; 664 NW2d 254 (2003), this Court held that it is constitutionally permissible to apply the version of MCL 600.2162 in effect at the time of trial even where the actual marital communication occurred before the effective date of an amendment that limited the scope of the privilege.

With respect to the testimony of defendant's ex-wife regarding domestic violence, counsel was not ineffective for failing to challenge the testimony because it was admissible for the reasons stated earlier in this opinion.

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[6] No exception in subsection (3) is applicable.

[7] Subsection (2) is known as the spousal privilege, while subsection (7) is known as the marital-communications privilege. *People v Dolph-Hostetter*, 256 Mich App 587, 588 n 1; 664 NW2d 254 (2003).

With respect to the photographs of the victim's stab wounds, we conclude that the photos were admissible. The prosecution was required to prove each element of the crime beyond a reasonable doubt, regardless of whether defendant disputed or conceded any of the elements. See *People v Mills*, 450 Mich 61, 69-70; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995) (photos admissible as relevant to establishing the elements of the crime and the credibility of the witnesses). The photographs were admissible for the proper purpose of proving the manner of death, and they were also relevant and admissible on the issue of intent. Death by stabbing is intrinsically gruesome, but this alone does not warrant exclusion. See *People v Unger*, 278 Mich App 210, 257; 749 NW2d 272 (2008) (noting that gruesomeness alone need not cause exclusion). The probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. MRE 403; *Mills, supra* at 71. Accordingly, defense counsel was not ineffective for failing to raise a meritless objection to admission of the photographs.

With respect to the prosecutor's suggestion in his opening statement that race was a motivating factor in the killing, "[t]he general rule is that when a prosecutor states that evidence will be submitted to the jury, which subsequently is not presented, reversal is not warranted if the prosecutor acted in good faith." *People v Pennington*, 113 Mich App 688, 694-695; 318 NW2d 542 (1982). Here, it would not be unreasonable to infer from the evidence presented that race played some role in the murder. An objection would have been futile. There is also no indication that the prosecutor acted in bad faith in framing his opening statement. Moreover, defense counsel may very well have planned to later exploit the reference in the opening statement, believing that the evidence in support of the prosecution's theory might be tenuous at best. Further, interjecting an objection during the opening statement may have led the jury to believe that there was merit to the prosecutor's position and that defense counsel wished to bury the issue. Defendant has failed to overcome the strong presumption that counsel's actions constituted sound trial strategy.

Finally, with respect to the lay opinion testimony that defendant argues counsel should have sought to have stricken from the record, the court indeed directed the jury to disregard the prior testimony on objection by counsel, and jurors are presumed to follow an instruction to disregard evidence. *People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001). We are not prepared to hold that reversal is warranted simply on the basis that counsel should have sought clarification or a broader striking of the testimony, where the trial court arguably may not have been entirely clear in indicating to the jury what prior testimony was to be disregarded. Counsel's performance was not deficient, nor was defendant prejudiced.

Defendant next argues that testimony concerning his alleged accomplice was inadmissible given that it was irrelevant and prejudicial. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). We fail to see how defendant was prejudiced by the evidence, MCL 769.26. The evidence was relevant to giving the jury a full picture of the events that transpired, MRE 401; it is difficult to conceive of how testimony could have been presented without any reference to the accomplice, and, despite the accomplice's being separately convicted of the murder, the jury was not made aware of this fact; therefore, there was no danger of guilt by association, *People v Lytal*, 415 Mich 603, 612; 329 NW2d 738 (1982). Reversal is unwarranted.

Finally, defendant argues that the sentence, imposed under the judicial sentencing guidelines, was excessive and disproportionate to the crime, given that there was no physical

evidence linking defendant to the crime, that the stabbing was committed 37 years ago, and that defendant had no prior criminal record. Regarding the argument premised on the lack of physical evidence, such an argument might pertain to a challenge of the underlying conviction on sufficiency or great weight grounds, but it has no meaningful relevance to sentencing; defendant was convicted of second-degree murder by the jury. Further, the fact that the victim was murdered 37 years ago provides no basis for a more lenient sentence. Defendant effectively had 37 years of freedom during his youth that he should not have been able to enjoy. We conclude that the sentence was proportionate to the offense and the offender and that the trial court did not abuse its discretion in sentencing defendant to 25 to 40 years' imprisonment. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey